INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute and contractual provisions involved	3
Statement	3
Argument	13
Conclusion	23
Appendix	24

CITATIONS

Cases:	
Anderson v. *Mt. Clemens Pottery Co.*, 328 U. S. 680	23
Frazier-Davis Construction Co. v. *United States*, 100 C. Cls. 120	16, 17
Merritt-Chapman & Whitney Corp. v. *United States*, 99 C. Cls. 490	17
Nolan Bros., Inc. v. *United States*, 98 C. Cls. 41	17
Seeds & Derham v. *United States*, 92 C. Cls. 97, certiorari denied, 312 U. S. 697	17, 18
York Engineering and Construction Company v. *United States*, 103 C. Cls. 613, certiorari denied, 327 U. S. 784	17
Statutes:	
Act of July 23, 1937, c. 520, 50 Stat. 633, 28 U. S. C. 250b	13, 24
National Industrial Recovery Act of June 16, 1933, c. 90, Title II, 48 Stat. 200, 400 U. S. C. 401 *et seq*	4
Sec. 206	4
Miscellaneous:	
H. Rept. 296, 75th Cong., 1st Sess., pp. 1, 2, 4–6	18

767837—47——1

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 385

ADDISON MILLER, INC., AND FIELDING & SHEPLEY, INC., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 40–50) has not yet been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on April 7, 1947 (R. 50). A motion for a new trial filed by petitioners was denied by an order of the court entered on July 7, 1947 (R. 50). The petition for a writ of certiorari was filed on October 3, 1947. The jurisdiction of this Court is invoked under the provisions of the Act of July 23, 1937, *infra,* pp. 24–25, and Section 3 (b)

of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

In conformance with Title II of the National Industrial Recovery Act of June 16, 1933, a government contract with petitioners for the construction of a public work required that preference for employment on the project be given to such qualified local residents as were available, who were to be procured, to the fullest extent possible, from government-designated employment agencies. Petitioners, contending that they had incurred excess costs by reason both of the failure of the Government to supply qualified labor and its improper enforcement of rules which deprived petitioners of control over their personnel, brought suit to recover damages under the Act of July 23, 1937, *infra,* pp. 24–25. The question here is whether the Court of Claims erred in dismissing the petition on the following grounds:

(1) The Government, in referring to petitioners' labor which, though not experienced in the particular jobs involved in the project, was as skilled as the locality afforded, was supplying "qualified" labor under the labor clauses of the contract.

(2) The Government, in requiring that discharges and demotions of government-referred personnel could be made only with its approval, was not thereby imposing on petitioners rules

which were unreasonable or inconsistent with the provisions of the contract or which deprived petitioners of normal control of their personnel.

(3) When requisitions for labor were received from petitioners, the Government was entitled to a six-day period within which to seek to fill them with registrants from its employment agencies, and where requests for authorization to employ skilled and semi-skilled labor were received from petitioners, to a two-day period after receipt of such requests; but any delays in granting authorizations beyond such respective periods constituted a breach of the Government's obligations under the contract.

(4) Though the Government wrongfully delayed in the granting of authorizations to petitioners in some cases, petitioner failed to establish to what extent, if any, damage resulted therefrom or, if it did, the measure of such damage.

STATUTE AND CONTRACTUAL PROVISIONS INVOLVED

The Act of July 23, 1937, c. 520, 50 Stat. 533, 28 U. S. C. 250b and Article 19 (a) and (b) of the contract are set forth in the Appendix, *infra*, pp. 24–26.

STATEMENT

This case, brought under the Act of July 23, 1937, *infra*, pp. 24–25, involves a government contract entered into with petitioner corporations on April 4, 1935, under the provisions of Title II of the

National Industrial Recovery Act (June 16, 1933, c. 90, Title II, 48 Stat. 200, 40 U. S. C. 401 *et seq.*) (R. 8, 9). The contract provided for the construction of a spillway gate structure and appurtenant works in connection with the Fort Peck Dam project on the Missouri River (R. 8, 13). The total value of the work here involved was $3,258,750 (R. 13). In compliance with Section 206 of the National Industrial Recovery Act (48 Stat. 204, 40 U. S. C. 406) and in conformance with its purpose to relieve unemployment and to rehabilitate industry through useful public construction projects, Article 19 (a) and (b) of the contract, *infra,* pp. 25–26, required that preference in employment be given to local labor, where it was available and "qualified to perform the work to which the employment relates," which labor was to be secured, "to the fullest extent possible," from government-designated local employment agencies.

Petitioners contend (see Pet. 2) that the United States breached obligations it had assumed under these labor-preference provisions, resulting in delays in performance of the contract and consequent damage to petitioners, by: (1) supplying petitioners with inefficient and unqualified labor, (2) delaying to grant petitioners authority to hire their own labor elsewhere notwithstanding the Government's failure to supply qualified em-

ployees within a 48-hour period after petitioners had requisitioned labor from its employment agencies, and (3) requiring that no government-referred worker be refused employment, discharged, or demoted below his referral classification without government approval. For these alleged breaches, a judgment was requested in the sum of $826,567.63 (R. 6).

The pertinent facts found by the court below may be summarized as follows:

Montana, in which the Fort Peck project was located, is a sparsely populated state, largely devoted to agriculture (R. 19–20). There had been no heavy construction work in the state prior to 1934 comparable in magnitude to the Fort Peck Dam project (*Ibid.*). Thus, the experience of local labor was quite limited. Petitioners were fully familiar with this labor situation when they bid on and entered into the contract in question, for, during 1934, they had performed two other contracts at Fort Peck which contained labor-preference clauses similar to those in the April 4, 1935 contract, and they had employed the same general superintendent on those jobs (R. 11–12). As a result of their 1934 experience, petitioners were also fully aware of the contract provisions and the rules and regulations respecting labor procurement on the project (R. 16–17). Such rules were in every essential respect the same as or simi-

lar to the rules which had theretofore been in effect during 1934 (R. 16).[1]

The procedure adopted to effectuate the labor-preference provisions of the contract was substantially as follows: Upon approval by the Government of the number and classes of key personnel, petitioners had a free hand in their selection; there is no evidence that there was any abuse by the Government with respect to such key positions (R. 14). All employees other than key personnel, however, were required to be obtained through the office of the National Reemployment Service (the "NRS") at Glasgow, Montana, or through recognized union locals (R. 15, 17). Petitioners, either initially or in confirmation of prior telephone requests, would submit written requisitions giving detailed information as to the work to be performed, the number and classification of workers required, and the time when they would be needed (R. 19).[2] The NRS office at Glasgow would endeavor to fill requisitions first from local reg-

[1] It is undisputed that before petitioners bid on the 1935 contract, here involved, they were cognizant of the requirements, imposed on them by Article 19 (a) of the contract and the implemental rules and regulations, to procure all employees other than key personnel, to the extent qualified employees were available, through the National Reemployment Service office at Glasgow, Montana, from the local citizenry (R. 11–12, 16–17).

[2] Most of the requisitions stated that the workers were required "at once." However, it was understood by all parties that "at once" meant at as early a date as practicable (R. 19).

istrants residing adjacent to the project; then, through other NRS offices, from outside counties and, when necessary, from outside the state (R. 20).

Some delay in procuring qualified registrants and satisfying petitioners' requirements was, of course, encountered. In 1935, approximately 69 percent of the NRS workers who reported to and were hired by petitioners reported and were employed more than two days after they were requisitioned, and approximately 11 per cent reported and were employed more than six days after they were requested; in 1936, the corresponding percentages were 74 percent and 23 percent; in 1937, 37 percent and 2.3 percent (R. 23).[3] In accordance with the rules, petitioners employed all NRS-referred workers whom they had requested except those who failed to pass physical examinations, who declined to work, who failed to report for examination, or who, by their own admission, were not capable of performing the work for which they had been designated by the NRS (R. 22). A letter of May 4, 1935, addressed to petitioners by the Government's representative, directed that no NRS-referred worker be denied employment in

[3] The detailed breakdown appears at R. 23. The two-day and six-day breakdowns are significant because petitioners contend that a breach occurred to the extent referrals were delayed beyond forty-eight hours (Pet. 28–31), and the court below concluded that a breach occurred only with respect to delays beyond six days (R. 47).

the position for which he was referred or be discharged until his qualifications were passed on by a construction inspector assigned to the contract, and that no such worker be employed in a position at a lower rate of pay except after he had been discharged and re-referred by the NRS at the lower classification (R. 15–16, 31).[4]

The number of discharges for cause on petitioners' contract was not abnormal: there was an average of about one dismissal a day out of a total employment of 600 to 700 men; this is low when compared with other projects of this size (R. 33).[5] Indeed, whereas only 15.21 percent of the NRS-referred workers employed during the three years in question were discharged for cause, 24.7 percent of the workers hired independently and directly by petitioners were so

[4] These rules were substantially the same as those in effect in 1934, and petitioners were familiar with them prior to the execution of the contract here in question (R. 16). The rules were designed to avoid complaints of wrongful discharges and to have the record clear if complaints came back through political sources to the District Engineer's office (R. 31). Discharges requested by petitioners were approved in all cases without unnecessary delay (*Ibid.*).

[5] Petitioners quarrel with this finding, pointing to the greater percentage of discharges of NRS workers referred to their job than of those referred to the neighboring job performed at the same time by Spillway Builders, Inc. (Pet. 25–28). However, this contention of petitioners can hardly be reconciled with the testimony of their own general superintendent that there was no discrimination as between petitioners and other contractors in the character and qualifications of the workers referred by the NRS (R. 53, 106).

discharged (R. 31). As to quitting, some 50 percent of all the NRS-referred workers quit of their own accord prior to the termination of the work seasons during the years 1935 to 1937, for various reasons (R. 32). The labor turn-over on petitioners' contract, however, was not abnormal when compared with other large construction projects: the number of men who quit averaged about three per day out of a total pay roll of 600 to 700 men (*Ibid.*). Likewise, although petitioners engaged in a certain amount of training of workers, particularly in the unskilled and semi-skilled classes, this is a normal and expected practice in projects of this character; petitioners chose to train and promote men as a practical and convenient means of meeting the peculiar problems inherent in obtaining labor from the sources required by their contract (R. 33, 35).

Only after it had exhausted all possibilities of obtaining labor from its sources to fill petitioners' requisitions, did the NRS issue letters authorizing petitioners to procure workers from such other sources as they might desire (R. 24, 27).[6] Long delays frequently occurred before such letters of authorization were issued and before petitioners secured the necessary labor (R. 27). A

[6] In 1936 and 1937, when unusual stringencies in the labor situation developed, the Government sought to alleviate them also by authorizing petitioners to work its labor beyond the 40-hour per week maximum fixed by the contract (R. 27–29).

rule announced by the state office of the NRS for its county managers in a letter dated November 29, 1933, that contractors "cannot employ a man only in a supervisory capacity until he has first requisitioned your office * * *, and if you cannot supply his demand within 48 hours * * * he may then employ his own men * * *," was apparently not followed by the Glasgow NRS office at all with respect to the Fort Peck project, and petitioners did not know of the rule until after the work under their contract had been completed (R. 17).[7] Petitioners requested, in all, authority to employ 117 men; authority to employ 56 of these was not given until more than two days after the requests were made (R. 27).

Once a letter of authorization was issued, however, it continued in effect throughout the remainder of the contract, and the positions affected could thereafter be filled without further clearance by the NRS (R. 24). By 1937, petitioners had letters of authorization accumulated from 1935 and 1936 which permitted them ample time to find and select the full complement of skilled men they required (R. 27). Moreover, in the fall of 1936 and at the beginning of the 1937 work season, arrangements were made with petitioners under which they were authorized to hire directly, with-

[7] In none of the letters of authorization granted petitioners was any reference made to this rule; the reasons given in such letters for their issuance were nonavailability of workers and the inability of the NRS to furnish them (R. 18, 24).

out prior approval, all NRS workers released by the Government or other contractors; only a few of these were subsequently disqualified for employment by the NRS (R. 22).

Although the performance of the contract was affected by delays resulting from such inexperience of the NRS-referred workers as may have existed and the slowness of the NRS office in referring workers, or, in the alternative, authorizing petitioners to employ their own men, its performance was also affected, and seriously, by delays arising from petitioners' inexperience on work of the type here involved, from manufacturing defects and faults in the original designs, and from other such causes unrelated to the labor situation (R. 35–36). For a number of delays so caused, petitioners were granted extensions of time and additional compensation; for a number, they alone were responsible (R. 12, 35, 36).* Except for those delays where extensions of time were granted, the extent to which these various factors delayed final completion of the work is not shown (R. 36). Nor does the proof indicate any definite extent to which labor shortages and inefficiency of workers actually delayed the comple-

*The completion date was originally April 3, 1937, but this was extended from time to time until January 21, 1939 (R. 9). Petitioners neither requested nor obtained any extension as a result of delays allegedly resulting from the failure of the NRS to furnish adequate labor of the quality required (R. 35).

tion of the contract (R. 35). The proof merely shows that petitioners' estimate of labor costs upon which their bid was predicated was inadequate to perform the work under the contract and that their actual labor costs for direct labor exceeded by about $123,000, the composite of the estimates of three other contractors who had submitted bids on the work and of the United States Engineers (R. 39–40).[9]

On these facts the Court of Claims held that the Government had not breached its contract except in some minor details and as to those it further held that petitioners had not proved any damages. It accordingly dismissed the petition (R. 50).

---

[9] Petitioners neither protested the labor rules set forth by the Government in the letter of May 4, 1935, nor appealed any labor issue to the Board of Labor Review, as provided by the contract (R. 35). On October 22, 1936, they submitted a claim for $200,000, representing damages which had theretofore allegedly resulted from delays by the Government in referring qualified employees or, alternatively, authorizing petitioners to procure them elsewhere (R. 36–37). This claim was denied, and an appeal to the Secretary of War rejected on the ground that labor had been furnished in accordance with the provisions of the contract with reasonable promptness and that there was no factual or legal basis for additional compensation because of inefficiency or shortage of labor (R. 37). Thereafter, upon completion of all work under the contract, on October 5, 1938, petitioners reiterated this claim, then, however, claiming approximately $733,000 in damages (R. 37–38). This claim was likewise rejected (R. 38).

ARGUMENT

The Act of July 23, 1937, *infra*, pp. 24–25, confers jurisdiction on the Court of Claims to entertain claims by certain contractors[10] for excess costs allegedly incurred in the execution of their contracts by reason of the Government's promulgation and enforcement of rules and regulations, misinterpreted and wrongfully enforced or disregarded or inconsistent with the contracts, "which rules and regulations, the enforcement or disregard thereof, deprived the contractors of normal control of their personnel;" or by reason of the Government's failure "to supply qualified labor under the labor clauses of the respective contracts * * *." It is carefully provided, however, that "This act shall not be interpreted as raising any presumption or conclusion of fact or law but shall be held solely to provide for trial upon facts as may be alleged." Petitioners urged below and again contend here that the Government did promulgate and enforce regulations depriving them "of the normal control of their personnel," that it failed to "supply qualified labor under the labor clauses" of the contract in question, and that excess costs were incurred by petitioners as a consequence. The court below held, first, that the Government had not failed to supply petitioners with labor of such qualifica-

[10] The Act is limited to contractors who entered into contracts, subsequent to June 16, 1933, for the construction of locks and dams for the improvement of navigation on the Mississippi River and its tributaries.

tions as they had a right to expect under the provisions of the contract and, thus, with "that character of labor which was called for in the Act" (R. 44). It held, further, that the rules requiring Government approval for petitioners' discharge or demotion of labor for incompetency were reasonable and consistent with the contract and that, in any event, their enforcement did not deprive petitioners of their rightful control over their personnel (R. 44–45). Although it also held that the Government had breached its obligations under the contract in two respects: (1) in failing to supply certain workers within six days of the time they were requisitioned or, in the alternative, authorizing petitioners to employ them elsewhere after the six-day interval; and (2) in failing to grant to petitioners, within two days of the time such requests were made, authorizations they had requested to hire 56 skilled and semi-skilled workers (R. 45–48); the court found it "impossible to form any sort of estimate of the extent to which * * * [petitioners] were damaged as a result of these delays" (R. 48). It consequently dismissed the petition (R. 50).

Although, in our opinion, the court erred in holding, even to a limited extent, that the Government breached any of its obligations under the contract, we submit that its dismissal of the petition below was clearly correct and that there exists no necessity for review of that ruling by this Court.

1. The Government fulfilled its obligations as to the quality of the workers referred to petitioners. Of course, as petitioners point out (Pet. 21), the "qualified workers" referred by the NRS which petitioners were required to prefer for employment had to be "qualified to perform the work to which the employment relates." Article 19 (a) of the contract, *infra*, p. 25. But to urge, as they apparently do, that the labor referred had to be experienced in the very work being performed on petitioners' contract—an experience which petitioners themselves lacked—is completely to ignore the purposes of the National Industrial Recovery program, in furtherance of which the project was undertaken.

The provisions of the National Industrial Recovery Act and of Article 19 of the contract were primarily designed to afford employment for the unemployed residents of the locality in which the public work was being constructed. An interpretation of the contract which would have deprived such residents of employment because they had had no prior experience in the particular type of construction called for by the public work in question, would have frustrated the very purposes of the recovery program. It is inconceivable that the Government, which had undertaken a vast nationwide program to alleviate the deleterious consequences of unemployment, would have entered into a contract in conflict with that program.

767837—47——3

Petitioners plainly knew this before they bid on and entered into the contract in question. They had had a year's previous experience on the Fort Peck project and were fully familiar with the labor situation which prevailed there and the type of labor being referred by the NRS (R. 11–12). Their general superintendent on this contract, who made all estimates on their work, had been their superintendent on the prior contracts and was familiar with labor conditions in the area before preparing his estimates on the contract in suit (R. 11–12, 101). Petitioners, therefore, well knew that the "qualified" local labor which the NRS would refer would be farmers and residents of small towns who, though they had analogous skills to those required, had never worked on a heavy construction job and would require some breaking in. They had full opportunity to take these considerations into account in preparing their bid. If they did not and consequently underestimated their labor costs, they cannot, after the contract has been performed, ask the Government to bail them out. Cf. *Frazier-Davis Construction Co.* v. *United States,* 100 C. Cls. 120, 163.

Moreover, as the court below remarked, the proof as to the alleged incompetency of the NRS workers is largely general, petitioners relying almost wholly on the data as to discharges of such labor (R. 32, 43). But, as expert witnesses testified, the discharges were not abnormally high, and the labor turnover was low for a job of this kind

(R. 32, 33). The fact that there happened to be more discharges on petitioners' job than on a neighboring job is not significant, absent any showing of why that was so; what is clear, as petitioners' general superintendent himself conceded, is that the discharges did not occur because the workers referred to petitioners were in any wise poorer than those referred to its neighbor contractors (R. 53, 106).

Petitioners' contention that the Government failed to refer "qualified workers," as that term is used in the contract, is therefore without any basis in fact. And the conclusion of the court below, that the Government did not fail to supply "that character of labor which was called for in the Act" (R. 44), was fully justified.[11]

2. Petitioners' second claim is that the restrictions imposed by the Government upon discharge and demotion of the NRS-referred workers were inconsistent with the contract and deprived petitioners of normal control of their personnel. This contention is likewise without merit. Here, as in respect to the quality of the labor referred, the short answer to petitioners' claim is that they were

[11] This ruling is in accord with prior related decisions of the Court of Claims, in two of which review has been denied by this Court. *Seeds & Derham* v. *United States*, 92 C. Cls. 97, 116, certiorari denied, 312 U. S. 697; *York Engineering and Construction Company* v. *United States*, 103 C. Cls. 613, 651, certiorari denied, 327 U. S. 784; *Nolan Bros. Inc.* v. *United States*, 98 C. Cls. 41, 82; *Merritt-Chapman & Whitney Corp.* v. *United States*, 99 C. Cls. 490, 547; *Frazier-Davis Construction Co.* v. *United States*, 100 C. Cls. 120, 163.

aware of these restrictions long before they bid on the contract. For, during 1934, in performing their prior contracts on the project, they had operated under similar rules (R. 16–17). Petitioners might possibly have reason to complain had prevailing practices been altered; they can hardly be heard to complain, however, that the same practices were continued in force unchanged. The Act of July 23, 1937 was intended to afford relief to those contractors who had no opportunity to anticipate rules and regulations promulgated after the execution of the contract and the situations they would create, not to subsidize those who had adequate basis for anticipating such situations. See House Report 296, 75th Cong., 1st Sess., pp. 1, 2, 4–6; *Seeds & Derham* v. *United States,* 92 C. Cls. 97, 116–117, certiorari denied, 312 U. S. 697.

It is clear, upon analysis, moreover, that these restrictions were quite reasonable, if indeed not necessary to a proper enforcement of the contract. Absent such rules, contractors would have been able with impunity to nullify the provisions of Article 19 of the contract, *infra,* pp. 25–26, and thus the basic purpose of the National Industrial Recovery Act; for, by arbitrarily refusing to accept qualified NRS-referred workers, they could create a situation where they could point to the paucity of the available labor supply and demand the right to select men from sources of their own choosing. Moreover, by controlling discharges and demo-

tions, the Government could prevent the downgrading of qualified workers, a practice which might otherwise have been possible because of the workers' financial condition and their inability to finance their return home.

The rules did not have the effect of depriving petitioners of normal control of their personnel. The record discloses not a single instance where an inspector required a contractor to accept an unqualified man in its employ. In practice, on the job, the rules caused no disruption to petitioners' organization, the approval required from the Government's inspectors was afforded promptly, and no dispute ever arose between petitioners and the Government's representatives with respect to these matters (R. 31, 35).

3. Petitioners further contend that the Government breached its obligations under the contract by failing to supply qualified workers to them within 48 hours of their requisitions or, alternatively, to authorize petitioners, after the lapse of that period, to procure such labor elsewhere.[12] In this claim, petitioners rely on a memorandum issued by the state office of the NRS in 1933, advising its county managers that (R. 45):

> The employer or a contractor cannot employ a man only in a supervisory capacity

[12] In urging such an interpretation of the contract, petitioners are, to say the least, indulging in an astonishing paradox. Whereas they urge that they should not have been subjected to the rules with respect to discharge and demotion,

> until he has first requisitioned your office in writing * * *, and if you cannot supply his demand within 48 hours after you have received this notice he may then employ his own men without referring to your list.

This "rule" is far from clear. On first reading, it would seem to apply to supervisory personnel only. But even if "only" is to be read "except", as petitioners would have the Court read it, the "rule" was not embodied in the contract, either expressly or by implication, and it was never complied with so far as the Fort Peck project was concerned (R. 17). There is nothing to indicate that compliance was imperative; the "rule" was no more than an inter-office memorandum, administrative advice from a superior agency to its subordinates; and petitioners, who knew nothing of it and thus could not possibly have expected it to be followed, can hardly complain.

This is particularly so because the contract, on the precise terms of which petitioners otherwise strongly rely, prescribed no limiting period on the obligation assumed by petitioners to procure all available qualified labor first from NRS sources. A 48-hour limitation was expressly provided so far as requests to unions were concerned, but as to

---

of which they were aware before entering into the contract; they contend that a rule limiting referral endeavors of the NRS to 48 hours, of which they were not aware until the trial of this case, should have been enforced.

the NRS, labor was to be chosen from its registrants "where such labor is available and qualified to perform the work to which the employment relates" and "to the fullest extent possible," *infra*, p. 25. In the absence of a fixed time limit, the court below quite properly construed the contract to require that the preferences provided be accorded during a "reasonable time" (R. 46). In view of the sparse supply of qualified labor available in Montana, of which petitioners had knowledge prior to the execution of the contract (R. 19–20), we believe that the Government in no case unduly delayed in referring qualified labor under the contract. The Court of Claims, however, found that it had been responsible for unreasonable delays to the extent referrals were not made and authorizations were withheld beyond six days after the requisitions were received, and to the extent authorizations requested were not granted within two days of the time they were requested. Though we do not subscribe to the court's construction of the contract, we suggest that it finds much more support in the record than does the interpretation advanced by petitioners.[13]

4. Although it found that the Government had

[13] It is noteworthy that this claim of petitioners, that damages were incurred because of the Government's wrongful delays in referring labor to the contract, was not included in their petition (R. 1–6) but was an afterthought pressed for the first time during the trial of the suit.

breached its obligations under the contract in the two respects noted above, p. 21, the Court of Claims concluded that it was "impossible to form any sort of estimate of the extent" to which petitioners were damaged in consequence thereof (R. 48). This is plainly the case. Accepting its findings as to the unreasonableness of the Government's conduct in deferring the supply of labor and the grant of requested authorizations to petitioners beyond the six-day and two-day periods, respectively, still it cannot be determined with any certainty whether petitioners' delays in completing performance under the contract are attributable at all to such wrongful conduct on the part of the Government. Delays in performance there indisputably were (R. 35–36). But such delays in performance were at least in part and perhaps entirely owing to petitioners' own inefficiency and errors and other causes outside the labor situation (*Ibid.*). For some of these delays, petitioners were granted extensions of time (R. 9, 12). To what extent such delays as might conceivably have resulted from the Government's conduct coincided with delays otherwise caused and to what extent they were compensated by such extensions, it is impossible to ascertain from the record. As the court below found (R. 35):

> The proof fails to indicate any definite extent that labor shortages and inefficiency of workers actually delayed the completion of * * * [petitioners'] work.

Moreover, even assuming *arguendo* the certainty of damage, still petitioners have failed to suggest any reasonable formula to measure its extent. Cf. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, 688. Abandoning the measure advanced in their petition and urged by them in the court below, they now submit, for the first time, a so-called "inductive reasonable basis" apparently never suggested below, under which the damages would be measured by applying the ratio between the man-days of delay in referring workers and granting authorizations and the man-days of actual employment on the job to the direct labor costs and indirect labor costs (Pet. 36–38). This formula, if we comprehend it correctly, seems hardly more reasonable than the formula rejected below and now abandoned by petitioners.

CONCLUSION

The decision of the Court of Claims dismissing the petition is plainly correct. It is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
HERBERT A. BERGSON,
Acting Assistant Attorney General.
PAUL A. SWEENEY,
HARRY I. RAND,
Attorneys.

NOVEMBER 1947.

APPENDIX

1. The Act of July 23, 1937, c. 520, 50 Stat. 533, 28 U. S. C. 250b provides as follows:

> That jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and enter judgments against the United States upon the claims of the several contractors for alleged excess costs incurred in the execution of their respective contracts, entered into since June 16, 1933, for the construction of locks and dams for the improvement of navigation on the Mississippi River and its tributaries, by reason of the Government having promulgated and enforced, as alleged, due, as alleged, to the national emergency and subsequent to the dates of the several contracts, rules and regulations referred to in the several contracts and misinterpreted and wrongfully enforced or disregarded, as alleged, and rules and regulations not referred to in and inconsistent with the respective contracts, as alleged, which rules and regulations, the enforcement of disregard thereof, deprived the contractors of normal control of their personnel, as alleged, and further by reason of the Government having failed, as alleged, to supply qualified labor under the labor clauses of the respective contracts, resulting in excess costs, including general overhead and depreciation, to the said several contractors on their respective contracts, as alleged; the said judgment or decrees, if any, to be allowed notwithstanding the bars or defenses of any alleged settlement or adjustment heretofore made, res

judicata, laches, or any provision of law to the contrary.

This Act shall not be interpreted as raising any presumption or conclusion of fact or law but shall be held solely to provide for trial upon facts as may be alleged.

Review of such judgment may be had by either party in the same manner as is provided by law in other cases in such court.

2. Pertinent provisions of the contract involved are as follows:

ART. 19. (*a*) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-servicemen with dependents, and then in the following order: (1) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the political subdivision and/or county in which the work is to be performed and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State, Territory, or district in which the work is to be performed: *Provided,* That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates, and preference shall be given to those unemployed at the date of registration who, at the date of selection, have no other available employment.

(*b*) *Employment services.*—To the fullest extent possible, labor required for the project and appropriate to be secured through employment services shall be chosen from the lists of qualified workers submitted by local employment agencies designated by the United States Employ-

ment Service: *Provided, however,* That union labor, skilled and unskilled, shall not be required to register at such local employment agencies but, if such labor is desired by the employer, shall be secured in the customary ways through recognized union locals. In the event, however, that employers who wish to employ union labor are not furnished with qualified union workers residing in the locality by the union locals which are authorized to furnish such labor, within 48 hours (Sunday and holidays excluded) after request is filed by the employer, all labor shall be chosen from lists of qualified workers submitted by local agencies designated by the United States Employment Service. In the selection of workers from lists prepared by such employment agencies and union locals, the labor preferences provided in section (a) of Article 19 shall be observed.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1947